9-1700-10403-2
DHR File No. ER 19950523

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Barbara Johnson,

Complainant,

vs.

Association of Minnesota Counties,

Respondent.

ORDER ON MOTION TO COMPEL AND FOR A PROTECTIVE ORDER

The above-entitled matter is before Administrative Law Judge Phyllis A. Reha on cross-motions to compel compliance with both parties' requests for discovery and other matters. On April 17, 1996, Respondent Association of Minnesota Counties (AMC) moved to strike four paragraphs of the Complaint in this matter. Complainant requested sanctions for having to reply to the motion. On June 11, 1996, Complainant moved to amend the Complaint to add the claim of sexual harassment.

On August 14, 1996, AMC moved for an Order to compel Complainant to submit to an independent psychological examination, requiring Complainant to respond to certain discovery, and to obtain a Protective Order. By a written Motion filed August 27, 1996, Complainant sought an Order compelling AMC to fully respond to interrogatory questions and produce documents, grant a motion *in limine* restricting any further inquiry into the issue of a disputed settlement, and award sanctions.

A telephone conference was held on September 13, 1996, in the above-entitled matter, to hear argument on all the motions filed by both parties. The telephone conference was heard by Administrative Law Judge Phyllis A. Reha, 100 Washington Square, Suite 1700, Minneapolis, Minnesota 55401-2138. Sandra R. Boehm, Attorney at Law, 2310 American National Bank Building, St. Paul, MN 55101-1808, represented Complainant, Barbara Johnson, at the telephone conference. Lawrence R. King, King & Hatch, P.A., Six West 5th Street, Suite 800, St. Paul, MN 55102, represented AMC.

At the close of the hearing, the record on this motion was kept open for the receipt of memoranda from the parties. The record on the motion closed on October 21, 1996, with the receipt of the Complainant's last filing.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the memorandum which follows, the Administrative Law Judge makes the following:

## ORDER

IT IS HEREBY ORDERED that:

1. Within fifteen days, the County shall give the notice set forth in Exhibit A to all employees covered by Complainant's Request for Documents Number 2 and within ten days thereafter shall submit those employee's personnel files to the Administrative Law Judge for an *in camera* review. At the same time the personnel files are submitted to the Judge, the County shall file an affidavit of compliance with the requirements set forth in Exhibit A.

2. Within fifteen days, AMC shall give full and complete answers to the questions in Complainant's Interrogatory Numbers 8, 10-13, and 18, including the home address and telephone number of the employees covered by the interrogatory questions. Where AMC is not in possession of the current address of any person, the last known address and telephone number of the person shall be provided and clearly identified as such. This paragraph extends only to information not contained in the personnel files identified in paragraph 1.

3. Within fifteen days, AMC shall provide full and complete responses to Complainant's Request for Production of Documents Numbers 1-3 and 6-13, consistent with the limitations on employee personnel files in this Order.

4. Within fifteen days, Complainant shall submit the information requested in Respondent's Request for Production of Documents, Set 2, Number 1, to the Administrative Law Judge for an *in camera* review.

5. The motion to compel an answer to Complainant's Interrogatory Number 25 is DENIED.

6. The motion to strike paragraphs 11, 12, 14, and 22 from the Complaint is DENIED.

7. The motion to amend the Complaint to add a claim of sexual harassment is GRANTED.

8. The motion to amend the Complaint to add damages for humiliation, inconvenience, embarrassment, and loss of enjoyment of life is DENIED.

9. The motion to compel Complainant to submit to an adverse psychological examination is DENIED.

10. The motion to compel answers to Respondent's Interrogatory Numbers 2 and 10 is DENIED.

11. The motion to compel answers to Respondent's Request for Admissions, Set One, Numbers 1-3, that Complainant has used three words cited as evidence of hostile environment, is DENIED.

12. The motion to compel answers to Respondent's Request for Admissions, Set One, Numbers 5-7, regarding Complainant's grant of authority to settle this matter, is DENIED.

13. Respondent's affirmative defense that this matter is settled is DISMISSED, and Respondent shall cease and desist from pursuing that defense.

14. Respondent shall pay $500.00 to Complainant for attorney's fees and costs incurred in responding to Respondent's assertion that this matter is settled. All other requests to award attorney's fees are DENIED.

15. Complainant's motion to hold Colleen Landkamer in contempt for failure to comply with a subpoena *duces tecum* is DENIED.

Dated: October ___, 1996.

_____
PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Both parties have filed numerous and detailed motions to compel a variety of actions from the other party. The issues in dispute are less numerous than the specific relief requested in the parties' motions. Resolution of some issues has the effect of resolving many of the disputes between the parties. Therefore, the motions will be analyzed primarily by issue, rather than by the action requested.

In the prehearing conference held in this matter, Complainant voluntarily amended her Complaint to drop any claim of emotional distress. Subsequently, Complainant has indicated that the claim for damages will include amounts requested as compensation due to Complainant feeling "humiliated, inconvenienced, embarrassed, and loss of enjoyment of life" from Respondent's conduct. Complainant's August 26, 1996 Response, at 2. Respondent asserts that those damages are the same as emotional distress and to properly defend on that issue, an independent psychological examination must be afforded. Complainant argues that no expert testimony is required to prove these damages and no professional can determine what Complainant subjectively experienced.

The Minnesota Human Rights Act (Minn. Stat. Chap. § 363, hereinafter "MHRA") defines the cause of action, the remedies, and procedural process of this matter. Any claim or endeavor that does not arise from the statute is beyond the jurisdiction of the Administrative Law Judge. There is a specific list of damages that can be awarded in a human rights matter. In tort law, compensatory damages include damages for emotional distress. Johnson v. Ramsey County, 424 N.W.2d 800, 804 (Minn.App. 1988). Under the MHRA, those damages are in separate categories. The MHRA expressly allows damages for emotional distress in addition to compensatory damages. Minn. Stat. § 363.071, subd. 2. The MHRA contains no specific reference to

humiliation, inconvenience, embarrassment, or loss of enjoyment of life. Under the statutory scheme in the MHRA, compensatory damages are such things as lost wages, medical bills, or other direct and quantifiable harm arising from discrimination. Emotional distress is the indirect damage caused to a person by illegal discrimination. Humiliation, inconvenience, embarrassment, or loss of enjoyment of life fall under the category of emotional distress for the purposes of calculating damages under the MHRA.

Since Respondent's request to add certain damages amounts to a reinstitution of a damage claim for emotional distress, the question of whether to compel an adverse psychological examination arises. Proper exercise of the discretion to order adverse psychological examinations is properly exercised was addressed by the Minnesota Court of Appeals as follows:

> In addition to claiming the order for exam was untimely, Kresko cites Robinson v. Jacksonville Shipyards, Inc. , 118 F.R.D. 525 (M.D.Fla.1988) for the proposition that psychological exams should never be ordered in sexual harassment cases. Robinson was a "hostile work environment" case where the plaintiff was requesting *damages for days lost from work* because of anxiety, depression, and emotional distress caused by the hostile work environment. The plaintiff was not asking for damages for ongoing psychological problems as a result of any defendant's actions. "A backpay award is not compensatory damages for harm suffered * * *." Id. at 531. Robinson stands for the proposition that a sexual harassment action does not automatically place the plaintiff's mental condition at issue. In the present case, Kresko placed her mental condition at issue and the trial court did not abuse its discretion in ordering a psychological exam.

Kresko v. Rulli, 432 N.W.2d 764, 770 (Minn.App. 1988)(emphasis added).

In another matter, an Administrative Law Judge refused to order disclosure of psychological records of witnesses on the basis of their mental state not being at issue in the proceeding. Padilla v. Minnesota State Bd. of Medical Examiners, 382 N.W.2d 876 (Minn.App. 1986). The Minnesota Court of Appeals analyzed the ALJ's actions as follows:

> 4. At the commencement of the hearing, Padilla obtained a subpoena permitting him to obtain all the medical and psychological records from any and all physicians of four former patients who had testified on behalf of the Board. All four patients signed waivers of their privilege with respect to their treatment by Padilla. Padilla sought the records to impeach the credibility of the Board's witnesses. Upon the Board's motion, the administrative law judge quashed the subpoenas. Padilla now contends that the denial of access to the records constitutes reversible error. Specifically, he argues that by testifying the witnesses waived their medical privilege under Minn.R.Civ.P. 35.03.

In a contested case hearing, any means of discovery available pursuant to the Rules of Civil Procedure is allowed. Minn.R. 1400.6700, subpart 2. Minn.R.Civ.P. 35.03 provides:

> If at any stage of an action a party voluntarily places in controversy the physical, mental or blood condition of himself * * * such a party thereby waives any privilege he may have in that action regarding the testimony of every person who has examined or may thereafter examine him * * * in respect to the same mental, physical or blood condition.

Id. (emphasis added). The administrative law judge ruled that the four witnesses are parties for the purposes of Rule 35.03, but that Padilla failed to establish that the witnesses placed a medical condition or mental condition in issue.

We need not decide whether the witnesses were parties for the purposes of Rule 35.03 to agree with both the administrative law judge's reasoning and decision that the witnesses had not placed a medical or mental condition in issue.

The charges against the Respondent are that he prescribed drugs where there was no medical indication that they were needed, that he prescribed drugs in excess of acceptable durations, that he inappropriately prescribed drugs to known drug users and persons known to have forged prescriptions, that he made improper sexual advances and engaged in inappropriate sexual contacts with patients, including sexual intercourse with patients, and that he conducted unnecessary pelvic examinations of some patients. At issue here is the acceptability of Respondent's treatment, and his sexual actions, not the witnesses' physical, mental or blood conditions.

In determining whether the Respondent's actions were appropriate, the treatment they may have received from other doctors was not shown to be relevant or material. Whether other doctors made similar prescriptions is irrelevant. What is in issue is acceptable medical practices. That must be established by expert testimony and does not justify discovery of the witnesses' privileged medical records.

* * *

*Since the mental condition of the four witnesses who testified against the Respondent is not placed in issue by their testimony regarding the treatment they received, the Respondent's subpoena*, which includes a request to examine medical records concerning any mental conditions they have sought treatment for, *must be denied*. If the rule were otherwise, a party could discover the psychiatric records of every

> adversary in the hope that a mental condition or personality trait reflecting on his credibility could be found. The law does not permit such an inquiry in every case and should not be permitted here.

Padilla, 382 N.W.2d at 883-84 (emphasis added).

In this matter, the Complainant is placing her mental condition, in the form of emotional harm suffered through Respondent's actions, at issue in this matter. Under the holding in Padilla, there is no reason to deny the request for an adverse psychological examination. Similarly, the damage complained of is not lost work days during Complainant's period of employment. The damages sought are to remedy the harm done to Complainant's emotional state. This is exactly the type of damage at issue in Kresko.

Complainant is correct in the assertion that expert testimony is not required to prove the damages asserted. This does not foreclose another party from exercising all the rights available in litigation. Having put her mental state at issue, Complainant cannot avoid discovery into that mental state, authorized under the appropriate procedural rule. Complainant indicated that, in the event that the damages were of the type that an adverse psychological examination would be ordered, Complainant would not pursue those issues. Therefore, the Judge will deny the request to compel an adverse psychological examination and order that the issues of humiliation, inconvenience, embarrassment, or loss of enjoyment of life are excluded from the damage calculation in this matter.

Respondent has moved to strike paragraphs 11, 12, 14, and 22 in the Complaint. Those paragraphs allege AMC's Executive Director treated nonemployee females inappropriately, caused a female employee at another firm to be fired, made disparaging remarks about female county commissioners, and engaged in abusive conduct to cause Complainant fear of harm, citing an incident between the Executive Director and a county auditor. Respondent argues that the paragraphs identified are not relevant to the issue of layoffs due to gender. Since sexual harassment due to hostile environment is not alleged, Respondent maintains that the offending paragraphs must be stricken since they are "a transparent attempt to embarrass, harass or annoy" the Executive Director. Respondent's Memorandum, June 3, 1996, at 1. Complainant has responded that the initial charge in this matter included claims of sexual harassment and those claims are reflected in the language of the Complaint. Complainant has moved to amend the Complaint to explicitly include sexual harassment through hostile environment.

There is no rule adopted by the Office of Administrative Hearings (OAH) regarding motions to strike. Under Minn. Rule 1400.6600, the Judge must apply the Minnesota Rules of Civil Procedure when the OAH rules are silent. Minn.R.Civ.P. 12.06 provides that material that is "redundant, immaterial, impertinent or scandalous" can be stricken from a pleading upon motion by a party within twenty days of service of that pleading on the moving party.

Respondent's motion to strike was served within the twenty-day limitation. The Minnesota Supreme Court has interpreted the reason for Minn.R.Civ.P. 12.06 as:

> The purpose of the rule is to assure the pleadings frame relevant issues for pretrial discovery and trial.

Tarutis v. Commissioner of Revenue, 393 N.W.2d 667, 669 (Minn. 1986)(footnote 1).

To grant the motion to strike, the language complained of cannot be relevant to any issue in the case. Wright & Miller, Federal Practice and Procedure: Civil 2nd § 1382. Complainant has initially alleged discrimination on the basis of gender in her layoff or termination. Statements or actions by the Executive Director showing bias against women in the workplace (not limited to AMC's workplace) are relevant to determining a *prima facie* case of direct discrimination or demonstrating pretext under the test for indirect proof of discrimination set out in McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973). Therefore, paragraphs 11, 12, and 14 are not appropriately stricken from the Complaint.

The relevance of paragraph 22 to the claims in the Complaint is less clear. The paragraph cites Complainant's fear of abuse from AMC's Executive Director. The paragraph goes on to mention "on information and belief" that an incident occurred between the Executive Director and a county auditor. The paragraph does not draw an explicit connection between Complainant's alleged concern and the incident. Further, the Complaint did not expressly allege a claim of sexual harassment based on hostile environment. Respondent goes further and points out that at the prehearing conference in this matter, Complainant stated that there was no hostile environment claim being advanced.

Complainant has now moved to amend the Complaint to include a claim of hostile environment. Under Minn. Rule 1400.5600, subd. 5, the Notice of Hearing can be amended at any time prior to the close of the hearing. Under that rule, if any new issues or allegations are raised, time must be made available for the parties to respond. Minn. Rule 1400.5600, subd. 7 places the burden on the Administrative Law Judge to prepare the Notice of Hearing. There are no standards in the rules concerning amending complaints. Minn.R.Civ.P. 15.01 allows amendments to complaints to be "freely given when justice so requires." Respondent has not identified any injustice that would arise from granting leave to Complainant to amend her Complaint. Allowing amendment of the Complaint to include a hostile environment claim renders aggressive conduct facially relevant to the issues raised. Any evidence on this issue remains subject to a relevance objection when the matter is actually presented for hearing.

Respondent has advanced numerous nondiscriminatory reasons for Complainant's layoff in support of its motion to strike. This is not a motion for summary disposition. The only appropriate test is relevance between the matter alleged and the facts identified. The reasons offered by Respondent to justify AMC's employment action do not address the issues raised by Respondent's motion.

Respondent has requested admissions that Complainant has used three words cited as evidence of hostile environment. Respondent's Request for Admissions, Set One, Nos. 1-3. Complainant has refused to respond, asserting that the question is irrelevant to the issues in this matter. Respondent argues that the use of the words by Complainant would show that she was not offended and was not subject to a hostile environment. Respondent's argument lacks merit. The use of certain words does not establish context for the use of those words. Just as use of certain words does not *prima facie* establish a case of discrimination, the use of those words by Complainant does not establish a defense to discrimination. Any effort to discover this information must be put in a context that allows relevance to be established.

Additional admissions were sought by Respondent regarding the issue of "accord and satisfaction." This issue arises because Complainant and Respondent, through their counsel had been seeking to settle the matter. The counsel had agreed upon a settlement amount of $3,500. Raiter Affidavit, Exhibit C. Four days later, Complainant informed Respondent that the situation regarding settlement had changed, based on the incumbent of the position formerly held by Complainant with AMC having left that post. Complainant maintains she had been laid off from that position. Complainant now offered to settle the matter for reinstatement at her former position (at reduced salary) and the settlement amount of $3,500. Respondent refused to reinstate Complainant and argues that the settlement was effective when counsel agreed upon the dollar amount. Since that time, Respondent has asserted that this matter has been settled and no further proceedings should ensue.

Accord and satisfaction or compromise and settlement can only apply where there is a meeting of the minds on the agreement between the parties. Dunnell's Minnesota Digest, Accord and Satisfaction § 2.01; Compromise and Settlement § 1.01. In this matter, there is no question that no meeting of the minds occurred. The letter purporting to settle the matter was not drafted with all relevant information at hand. An employee on layoff may well conclude to take lesser settlement where there is no likelihood of reinstatement. The employee's position in the litigation may well change, both subjectively and objectively if a position is vacated and the employee is not called back from "layoff." The settlement terms of $3,500 were immediately repudiated by Complainant. The perception on the part of Complainant, that her "layoff" should end since an incumbent had left employment with Respondent is appropriate to include in settlement negotiations.

The MHRA sets out a procedure for settling human rights claims. Under Minn. Stat. § 363.031, subd. 2, a waiver or release of rights under the MHRA may be rescinded within fifteen days of execution. Respondent's letter setting out the terms of the settlement includes the following language:

> In return for the acceptance of the sum of $3,500.00 Ms. Johnson has agreed to execute a **RELEASE OF ALL CLAIMS**. As a further consideration of the settlement amount paid, Ms. Johnson has agreed to withdraw and dismiss her Charge of Discrimination which she has filed with the Department of Human Rights.

Raiter Affidavit, Exhibit C (emphasis in original).

AMC was clearly aware that a written settlement agreement is required to resolve actions brought under the MHRA. No such settlement agreement was ever signed. Respondent's position is that the agreement to settle is enforceable without entering a written agreement. The statutory provision allowing recission of a written agreement is rendered a nullity if the agreement entered before the written agreement is executed can supersede the statutory language. There is no basis to order this matter dismissed as having been settled. There is no basis for requiring answers to Respondent's Request for Admissions on this issue.

Complainant has requested attorney's fees and costs be awarded for Respondent's pursuit of this issue. Complainant cites Minn. Stat. § 549.21 for the statutory authority for such an award. Minn. Rule 1400.7050, subp. 2, authorizes the administrative law judge in discrimination cases to impose sanctions when meritless claims are interposed for the purposes of intentional and frivolous delay. The lack of merit to the "accord and satisfaction" claim is obvious from the statutory language of the MHRA. The right to defend an action does not extend to asserting meritless claims. Therefore, the Respondent is ordered to cease and desist from any further assertion of a claim of accord and satisfaction or compromise and settlement. Respondent's claims on those issues are dismissed with prejudice. Respondent is ordered to pay the sum of $500.00 as attorney's fees for Complainant's costs to defend the accord and satisfaction portion of the parties' motions.

Complainant has requested discovery of matters which the Respondent deems private and privileged from public disclosure. These matters include salary, benefits, and other personnel questions ordinarily considered confidential. Minutes of meetings and bylaws for nonprofit corporations are also not normally public matters. AMC has indicated that it will answer the requested discovery once a protective order is in place. Complainant responded with an offer to stipulate that the Administrative Law Judge's file be sealed. AMC refused to accept that offer as not broad enough to protect the privacy interest of AMC and its employees. Complainant submitted a draft protective order that purported to render irrelevant Complainant's medical records, render all data subject to the MDPA, and limit disclosure of the information obtained during the proceeding. The draft order did not limit disclosures after the proceeding was over and did not resolve any issue regarding retention of documents or copies of documents.

Complainant asserts that information requested of AMC is public data within the meaning of the Minnesota Data Practices Act (Minn. Stat. Chap. 13, hereinafter "MGDPA"). The information sought and not received is salary and employment history for AMC's Executive Director, salary and benefits for several other employees, financial data for outsourced positions, any financial study done to justify Complainant's layoff, current home addresses for employees, minutes of meetings and bylaws of AMC. All or most of this information would be categorized as "public data" under the MGDPA and therefore, would not be subject to any objection in discovery if that statute applies to AMC.

All state agencies, political subdivisions, and statewide systems are subject to the MGDPA. Minn. Stat. §13.01. Political subdivisions are defined as:

> any county, statutory or home rule charter city, school district, special district and any board, commission, district or authority created pursuant to law, local ordinance or charter provision. It includes any nonprofit corporation which is a community action agency organized pursuant to the economic opportunity act of 1964 (Public Law Number 88-452) as amended, to qualify for public funds, or any nonprofit social service agency which performs services under contract to any political subdivision, statewide system or state agency, to the extent that the nonprofit social service agency or nonprofit corporation collects, stores, disseminates, and uses data on individuals because of a contractual relationship with state agencies, political subdivisions or statewide systems.

Minn. Stat. §13.02, subd. 11.

AMC does not fall within any of the categories of entity subject to the MGDPA listed in the definition. Complainant asserts that the AMC's receipt of money from counties creates a connection to the counties, similar to a joint powers agreement under Minn. Stat. § 471.59. There is no evidence in the record of this matter of a joint powers agreement having been executed to create AMC. To hold that the receipt of dues from counties, without more, makes a nonprofit corporation subject to the MGDPA would be to greatly extend the reach of the statute. The specificity of the definition of political subdivision is a strong measure of the legislative intent to limit the reach of the MGDPA. There is nothing in the language of the statute to support Complainant's interpretation that "political subdivision" includes the AMC. AMC is not a political subdivision and the MGDPA does not apply to any data AMC maintains.

Sealing the file with the Office of Administrative Hearings under the terms of Complainant's proposed order does nothing to protect the confidentiality of information in the possession of parties, counsel, witnesses or others related to the litigation. The normal practice in such matters is to issue a protective order that takes into account the privacy interests of all persons involved. AMC has shown that such an order is appropriate and the Judge has issued a Protective Order in conjunction with this Order.

Complainant's Interrogatory Number 18 requests identification of all exhibits AMC intends to offer into evidence at the time of hearing. AMC responded that all documents produced may be introduced. This answer does not respond to the interrogatory question. AMC must identify the exhibits it intends to introduce. This can make the hearing more efficient and less contentious by narrowing the areas of dispute and perhaps allowing the parties to stipulate to those exhibits that can be agreed upon.

Complainant has requested a person affiliated with AMC be held in contempt for failure to produce documents pursuant to a subpoena *duces tecum*. The Judge has no contempt power. Enforcement of OAH subpoenas is carried out in the district court in the district where the subpoena is issued. Minn. Stat. § 14.51. Therefore, the request for a contempt citation is denied.

Complainant has requested disclosure of any contract of insurance that might cover any liability under this matter. The existence or absence of insurance is not relevant to any issue in this matter. In the event that an award is issued and not paid, the MHRA provides for enforcement of the award by the District Court. Minn. Stat. § 363.091. Prior to issuance of an order awarding damages, there is no reason to compel disclosure of insurance.

P.A.R.